1976

American Gypsum Trust v. Georgia-Pacific Coporation : Brief of Appellant

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

AMERICAN GYPSUM TRUST, a common law trust, and JOHN PAUL JONES, ROBERT JONES, JOHN RUSSELL RITTER, DONALD W. McEWEN and BARRY PHILLIPS,

Plaintiffs-Respondents,

vs

GEORGIA-PACIFIC CORPORATION, a corporation,

Defendant-Appellant.

Case No. 13919

BRIEF OF APPELLANT

GEORGIA-PACIFIC CORPORATION

Appeal from the Judgment of the Sixth Judicial District Court of Sevier County, Don V. Tibbs, District Judge, Presiding

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ant's objection, received accounting evidence sponsored by plaintiffs using that procedure only. (Tr. 34, 110-11). The Court rejected as a matter of law offers of proof duly made by defendant designed to show:

1. The accounting procedure used by plaintiffs in this case is not consistent with "the accounting method approved by the Lessor and utilized by the parties in the years prior to 1965" as required by the Amended Declaratory Judgment entered by the Court below in the prior case.

2. The precise nature of "the accounting method approved by the Lessor and utilized by the parties in the years prior to 1965" which was prescribed by the Amended Declaratory Judgment of the Court below in the prior case.

3. The fact that testimony, books and records were available at the time of trial to compute "net profit rentals under the Fifty-Year Lease calculated by the accounting method approved by the Lessor and utilized by the parties in the years prior to 1965" as prescribed by the Amended Declaratory Judgment heretofore entered by the Court below in the prior case and that plaintiffs' computations and extrapolations were incompetent and illegal.

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bered from "1-130", when in fact the proceedings were held a year earlier on November 14, 1973 and the pages of the transcript of which are separately numbered 1-40.

The pages of the transcript for the September, 1974 proceedings will be referred to in the text herein as "[Tr.....]" and those of the November, 1973 hearing will be specifically identified.

4. The amount of net profit rentals due plaintiffs "under the Fifty-Year Lease calculated by the accounting method approved by Lessor and utilized by the parties in the years prior to 1965" was substantially less than those calculated by plaintiffs. (Tr. 111, et seq.)

RELIEF SOUGHT ON APPEAL

Appellant seeks to reverse the judgment of the Trial Court.

STATEMENT OF FACTS

This case has its origin and, under the specific rulings of the Trial Judge, had its finality established by the prior case between the same parties in the District Court. That former case involved the interpretation and application of some of the same lease agreement language which is here involved. We will, therefore, attempt to make a concise statement of the development, processing and disposition of the pertinent issues leading to this appeal.

1. *Genesis of this Case*:

a) *Pertinent Portions of the Proceedings in the Prior Case.*

The "Fifty-Year Lease Agreement" (R. 287) under which this controversy arose was executed on November 6, 1946 by the predecessors in interest to the parties to this litigation. Inter alia, the Lease provides

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Defendant-Appellant.

Case No. 13919

BRIEF OF APPELLANT
GEORGIA-PACIFIC CORPORATION

STATEMENT OF THE NATURE OF THE CASE

Plaintiffs brought this action to recover damages claiming that defendant had breached the terms of a

certain Fifty-Year Lease covering a gypsum ore deposit at Sigurd, Utah, as construed by Order Amending Declaratory Judgment entered by the District Court of Sevier County on November 4, 1973.[1] Defendant denied plaintiffs' claim and affirmatively asserted that plaintiffs' interpretation of the subject Lease Agreement, as construed by prior Judgment of the Court below, is erroneous as a matter of fact and as a matter of law.

DISPOSITION IN THE LOWER COURT

This matter was tried by the Court sitting without a jury on September 30, 1974. At the trial, the Court ruled as a matter of law that an opinion of the Utah Supreme Court[2] and the Order of the District Court of Sevier County amending Declaratory Judgment (R. 411) on remand from this Court, had *perpetually* fixed as the *only* permissible accounting method to be used in determining net profit royalties under the Lease, that procedure utilized in plaintiffs' Exhibits 139 through 143 (R. 141, et seq.) received in evidence by the District Court in the prior case.[3] The Court, over defend-

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[1] American Gypsum Trust, et al, v. Georgia-Pacific Corporation, Civil No. 6307. This action will be referred to herein as the former or prior case or trial.

[2] American Gypsum Trust, et al, v. Georgia-Pacific Corporation, Case No. 12887, 30 Utah 2d 6, 512 P.2d 658 (1973).

[3] It should be pointed out that the Clerk of the Court below erred in preparing the index to the Record on Appeal. The second page of the index contains two errors. The first indicates that the transcript pages of the "Proceedings held on September 30, 1974" are separately numbered from "1-40" when in fact they are separately numbered from 1-130. The second indicates that there were "Proceedings held November 14, 1974" and that the pages of the transcript of such proceedings are separately num-

in paragraph Second for a tonnage royalty on "all rock removed from the demised premises", for a "minimum annual rental" and for a 7% royalty computed upon the "annual net profit of the Lessee". A dispute in the computation of the 7% net profit gave rise to the controversy between the parties. The dispute was controlled by paragraph Second, subparagraph E which reads in pertinent part:

> In addition to the payment of the rentals set out above in paragraphs 'A' to 'D' [tonnage and minimum royalties], both inclusive, the Lessee covenants and agrees to pay the Lessor as rent for said demised premises during the said demised term of fifty (50) years seven (7%) percent of the annual net profit of the Lessee, before deduction of Federal and State income taxes, but excluding from the computation of said annual net profits all net profits and/or losses of the Lessee from the manufacture, sale or other disposition of all materials and products other than raw materials taken from the demised premises or other than products manufactured or processed from such raw materials. . . .
>
> The Lessee and the Lessor covenant and agree that the net profit, aforesaid, shall be determined in accordance with sound accounting principles and practices in the gypsum industry, and Lessee, and his assigns, agree that the business operation shall be carried on in a prudent and business-like manner for all interests concerned. In the event of any disagreement between the Lessor and the Lessee, or his assigns, hereunder with respect to items of either income or deductions for determining net profit, the parties shall

> be bound by the final determination of the Bureau of Internal Revenue for Federal income tax purposes for the year in which the dispute arises. . . .

By the terms of paragraph Fifth, the 7% royalty provision is made subject to an express proviso that "rock of the kind and quality needed can be supplied . . ." from the leased premises at Sigurd, Utah.

Following the former trial before the Court without a jury, the Honorable Ferdinand Erickson entered judgment on March 28, 1972 in which he ruled that defendant had not properly computed the 7% net profit royalty. He then entered Judgment in the sum of $315,724.18 against defendant. He also entered judgment declaring that during the remaining term of the Fifty-Year Lease, and "so long as there are mineable and processable reserves on the leased premises", defendant:

(a) Must operate its Sigurd plant at not less than a production level of 128,539,000 square feet of gypsum wallboard; provided that a sufficient market was available for its sale; and

(b) Net profit royalties must be computed "in the manner exemplified by plaintiffs' Exhibits 139-141 inclusive". (R. 33-35)

The 128,539,000 square feet minimum production level listed in the declaratory part of the Judgment was premised upon Finding of Fact No. 27 (R. 24) in which

Judge Erickson specifically found that defendant must "operate the Sigurd Plant [in the future] at not less than the average 1965, 1966 and 1967 production levels (128,539,000 square feet) . . . "Furthermore, the same minimum production level was a necessary ingredient in Exhibits 129 through 141 (R. 141, et seq.) referred to in the Declaratory Judgment which also underpinned the computation in support of the money judgment.

b) *Pertinent Portions of the Decree of this Court in the prior case.*

An appeal was duly perfected by defendant from both the fixed damage and declaratory portions of the Judgment in the prior case. Defendant sought a reversal of the money judgment claiming, among other reasons, that Exhibits 139-141 were not supported by sufficient foundation and were inadmissible in evidence as a matter of law. Defendant at trial had objected to those exhibits upon that ground. They were received in evidence by the Trial Judge, over objection upon the ground that "plaintiffs have established by a preponderance of the evidence that defendant Georgia-Pacific Corporation has not maintained its books and records of account in connection with the operation of the Sigurd plant and the leased premises in a manner which will permit a proper accounting of the net profit lease rentals due to plaintiffs under the lease." (Para. 3 of Conclusions of Law in prior case; R. 28)

One of the principal arguments made by defendant before this Court in the prior appeal attacking the

declaratory portion of the Judgment was that "Finding of Fact No. 27" requiring future operation of the plant at not less than the average 1965, 1966 and 1967 production levels (128,539,000 square feet) was erroneous as a matter of law.

The opinion of this Court in that case [R. 36; 30 Utah 2d 6, 512 P.2d 658 (1973)] was written for the majority by Justice Henroid and was filed on July 16, 1973. The Court affirmed the judgment below in the prior case with respect to the *money* judgment but *reversed* the ***Declaratory Judgment*** for prospective relief to the extent founded upon ***Finding No. 27*** (requiring production at the '65-'67 levels of 128,539,000 square feet). In this regard, the Court stated (30 Utah 2d at 12; R. 39):

> The terminology of Finding 27 that the income under the lease would be determinable if G-P "has a sufficient market" in the Western market found by the trial court is calculated to provoke perennial litigation, and there is nothing in the lease to justify such provocation. There could be a market in the area, but G-P may not want to enter it because it might be quite unprofitable. The finding's fallacy is an interdiction to use a market in the area if there is one. All we can glean out of the lease is that if there *is*, G-P and/or its subsidiaries or other agency under its direct or indirect control, or its successors, choose to enter and make sales in it, there is a duty absolute to use Sigurd ore and pay tribute to the Lessor according to the leasehold's terms as stated above. So being, Finding 27 is held

to be not only irrelevant to the facts, but irreverant to the leasehold.

Our conclusion as to Finding 27, therefore, is that it is not supported by the wording of the requirements of the lease or the facts, as to either of its two facets.

Considering the decision by its four corners, the Court sustained the *money judgment* which was premised in major part upon Finding No. 27 but *reversed* that portion of the *Declaratory Judgment* for future relief founded upon that Finding and remanded the matter to the District Court for further proceedings *to amend* the Declaratory Judgment consistent with the Court's opinion. The author judge, in explaining why this ruling was not internally inconsistent, stated (30 Utah 2d at 13; R. 40):

We conclude that the money judgment of the trial court be and it hereby is affirmed, as is the rest thereof, including that portion sustaining the accounting procedure reflected in Exhibits 139-141, but excepting that portion of the 'requirements' portion of the lease discussed hereinabove. That part is reversed with instructions to modify the same in consonance with the observations and opinions stated here.

With respect to the use of the years 1965-7 [as provided in Finding No. 27] as a basis for the money judgment, we think that because of evidence reasonably showing inaccessability of records under the discovery process, the trial court, using available, admissible evidence, fairly appraised the situation as to amounts due under the lease, — possibly even in defendant's favor,

as not to have been unsupported by past records, but conservative and just to both sides of this case.

Hence, it follows that this Court specifically affirmed the findings and conclusions of Judge Erickson to the effect that Exhibits 139-141 were admissible for the computation of money damages only because of the *"inaccessibility* of records" (emphasis added) made available "under the discovery process". Accordingly, the *money judgment* was affirmed although necessarily grounded upon Exhibits 139-141. However, the *Declaratory Judgment*, also grounded in the Trial Court upon Exhibits 139-141, was reversed and remanded with instruction to modify the same in consonance with the observation and opinion of this Court.

Parenthetically, we note that the interpretation placed by the Court below upon this Court's opinion in the prior case demonstrates that the "perennial litigation" sought to be avoided in Judge Henroid's opinion is the very product of that opinion.

c) *The Proceedings on Remand*:

1) *Plaintiffs' Motion to Modify Findings, Conclusions and Judgment.*

After remand by this Court, plaintiffs filed in the Trial Court a "Motion to Modify Findings of Fact and Conclusions of Law and Judgment, pursuant to Opinion and Order of the Supreme Court of the State of Utah". (R. 416) That motion, as here pertinent, in-

Following the Court's pronouncement, plaintiffs called their only witness, an accountant, Mr. Grant Caldwell. (Tr. 42) He testified that he had been engaged by plaintiffs to compute the 7% net profit royalty for the years 1971 through 1973 in the same manner and to the extent possible "identical" with the procedures used in the prior case in preparing Exhibits 139 through 143. (Tr. 49) He carried out that assignment and his work product was received in evidence over objection as Exhibits 129A through 148A. (Id.)

In preparing these accounting exhibits, Mr. Caldwell relied upon the same foundational assumptions of fact relied upon in the prior case, as well as additional assumptions equally unfounded. The assumptions in the prior case, as stated at pages 44 and 57 of Appellant's Brief to this Court are:

a) That the price decline in the Sigurd plant Western market area was caused solely by Appellant in its operation of the Lovell, Wyoming and Acme, Texas plants (which were not embraced by the Fifty-Year Lease Agreement and were not operated by the Lessee at the time the same was executed), and

b) That the Sigurd plant should have experienced profit levels in 1965-70 (1971-73 in the present case) equal to profit levels of 1962-64, and

c) That gypsum products could have been sold on the West Coast at the same profit levels in the years 1965-70 (1971-73 in the present case) as in the years 1962, 1963 and 1964, and

d) That during the years 1967-68 (1971-73 in the present case), the Sigurd plant could have produced at the 1967 production level and at the same profit level as reached in the years 1962-64.

In connection with his accounting testimony, Mr. Caldwell admitted:

a) That his expertise was in the field of accounting, not economics or marketing. (Tr. 77-78)

b) That in applying his assumptions and preparing his accounting exhibits, he had taken the highest production years reflected by records available to him (1965-1967) (Tr. 80) and the highest profit years reflected by the records available to him (1962-1964) (Tr. 78) and had utilized the same as the base for the 1971-73 accounting period. Hence, in extrapolating his figures, he ignored wholly the actual cost and profit records which were available to him, but seized upon and used for his computations the highest production level (1967) and the highest profit level (1962-64) the Sigurd plant had experienced in more than 25 years of operation. (Tr. 105). And he did this without having performed any studies as to economic and marketing factors in the market place for the years being considered. (Tr. 77)

c) That accounting records were available to him from which the per unit costs of production for years 1971 through 1973 could be computed. He also had available to him records from which the sales price to all customers could be determined for the entire Sigurd

(R. 7) The prayer of the complaint, accordingly and incorrectly, sought an accounting to determine the amount due on that unfounded theory and for judgment in that amount. Defendant, by its Answer (R. 73), generally denied and thereby placed in issue plaintiffs' erroneous allegation that the 7% royalty must, or indeed may, be computed for years 1971-73 on the basis of those exhibits submitted in the prior case. Trial thereon was conducted by the Honorable Don V. Tibbs on September 30, 1974. The judgment appealed from was entered by him on November 15, 1974. (R. 106)

3. *Evidence presented by Plaintiffs and Received by the Court over Defendant's Objections.*

The trial proceedings started and finished on the mistaken note that the Trial Judge's rulings were absolutely fixed and controlled by the opinion of this Court in the prior case and that Trial Judge was bound by the opinion of this Court to look *only* to the "manner exemplified in plaintiffs' Exhibits 139-143" in the prior case for the computation of 7% net profit royalties. Defendant insisted below, and we assert here, that the Trial Judge misinterpreted the opinion of this Court in the prior case. At the end of the opening statements of the parties, the Court below stated the following from the bench (R .34):

> [I]t's my understanding that I should look to the manner of accounting as set forth in those three exhibits [Exhibits 139-143] and that's what I'm going to do and so if it is a matter of law, we will decide that right now and it is decided.

us by way of declaratory was that the method utilized prior to 1965 *was the one that is proper under the lease.* [Emphasis added]

4) *Declaratory Judgment entered by the court below on remand.*

On November 14, 1973, the Court signed the substituted "Order Modifying Findings, Conclusions and Judgment" (R. 411) *prepared by plaintiffs* incorporating the concept contained in Mr. McCarthy's language quoted immediately above. That order provided, inter alia, that defendant's duty to make sales of gypsum products from the Lessor's mining properties was subject to the condition that "*rock of the kind and quality needed can be supplied from the Leased Premises . . .*" (Emphasis added) as requested by defendant. (R. 413) It further provided that the 7% net royalty provision in the future must be *calculated by the accounting "method approved* by the Lessor and utilized by the parties in the years prior to 1965." (R. 415; emphasis added)

2. *The Filing of the Instant Action.*

The complaint (R. 1) fostering this appeal was filed in the District Court of Sevier County on June 7, 1974. The complaint erroneously alleged, contrary to the express terms of the aforementioned modified Order dated November 14, 1973 (R. 415), that 7% net royalties for calqendar years 1971, 1972 and 1973 must be computed under the method "exemplified in Exhibits 139 through 143, received in evidence in the prior case".

itially and improperly proposed that Finding of Fact No. 27, Conclusion of Law No. 8 and Judgment each be amended to require *future* computations of net profit rentals under the Fifty-Year Lease to be made "in the manner exemplified in plaintiffs' Exhibits 139-143, inclusive . . ." (*Id.*)

Hence, initially the principal thrust of plaintiffs' Motion to Amend was to attempt to fix perpetually as the *only* and proper accounting procedure, as did Judge Erickson's Judgment which was reversed and remanded by this Court, that method reflected by Exhibits 139-143 as used in the prior trial.

2) *Defendant's response to Motion to Amend Findings, Conclusions and Judgment.*

Defendant thereupon duly filed its "Objections to Plaintiffs' Motion to Modify Findings of Fact and Conclusions of Law and Judgment". (R. 422) In those objections, defendant pointed out that plaintiffs' proposed modifications would be inconsistent both with (1) the clear, unambiguous and uncontroverted provisions of the Lease Agreement and with (2) the decision of the majority of the Supreme Court. Accordingly, defendant moved that the Trial Court delete completely all reference to Exhibits 139 through 143 and to add specifically two provisions which defendant contended were necessary to "modify" the judgment "in conconance' with the provisions of the lease itself and the "observations and opinions" stated in the Supreme Court decision. Those changes were:

(a) Insertion of the following language as a proviso: "provided that rock of the kind and quality needed can be supplied from the leased premises."

(b) Adding, in lieu of the language to be deleted relating to prior Exhibits 139-143, a requirement that the 7% net profit royalties be computed in the "manner utilized by the parties in years prior to 1965."

3) ***Hearing on plaintiffs' Motions to Modify Findings, Conclusions and Judgment.***

At the hearing on November 14, 1973 on plaintiffs' Motion to Modify and defendant's objections thereto, plaintiffs *withdrew* their proposed modifications and accepted conceptually those of defendant's objections discussed above. Plaintiffs consented to adding the following proviso: "provided rock of the kind and quality needed can be supplied from the Lessor's mining properties." Plaintiffs also consented to and actually *proposed*, as defendant had done in its objections, the deletion of reference to Exhibits 139-143 and a substitution in lieu thereof of language requiring computation of the 7% net royalty "*by the accounting method approved by the Lessor and utilized by the parties in the years prior to 1965.*" (Emphasis added)

In so doing, Dennis McCarthy, Esq., one of counsel for plaintiffs, admitted at page 6 of the transcript of that hearing that:

> *I think the principle is correctly recognized by the defendant that what in effect the court gave*

marketing area for each of the years in question. But, these he rejected in favor of his hypothesis. (Tr. 86-87)

d) That he did not take into consideration the Federally imposed price freeze during years 1971 through 1973. (Tr. 90)

e) That he further assumed that per unit costs were the same in 1971-73 as in the years 1962-64. (Tr. 89-90)

f) That he assumed that the "Acme", Texas plant was selling gypsum products in the "Sigurd marketing area"[4] in years 1971-73. (Tr. 84)

Defendant asserted below and argues herein that this "evidence" was inadmissible and should not have been received.

4. *Evidence Proffered by Defendant but Rejected by the Court.*

After plaintiffs rested, defendant made the following proffer of proof which it asserted could be proven at this trial. The Trial Court accepted the proffer but refused to consider the evidence proffered. (Tr. 110)

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[4] The "Sigurd marketing area", not referred to in the Fifty-Year Lease Agreement, but defined in the original Judgment entered by Judge Erickson and affirmed in the majority opinion of this Court, is the area occupied by "California, Oregon, Washington, Nevada, Idaho, Utah, Western Montana, Western Wyoming and Western Colorado."

Mr. Fred Oliver, a Certified Public Accountant and partner in Haskins & Sells, a National accounting firm, would be called as a witness and he would testify as follows: (Tr. 108, et seq.)

a) That he had been retained by defendants to review the Lease language and the Declaratory Judgment entered in the prior case, together with the Supreme Court opinion in the prior case, and to determine therefrom the proper accounting methods to be utilized and the net profit royalties, if any, due to plaintiffs for calendar years 1971-73.

b) That in the course of this assignment, he had examined plaintiffs' accounting exhibits, received in evidence by the Court and that the same were not prepared in accordance with generally accepted accounting procedures as required by the Lease and were not in conformance with the Declaratory Judgment of the District Court in the prior case because they *did not*:

(1) utilize available actual production records for the years in which the royalties were computed;

(2) utilize available records showing actual costs for the years in which the calculation was made;

(3) utilize available records showing actual sales prices to the end customer in the years for which the computation was made;

(4) consider the available evidence indicating the amount of ore reserves. (Tr. 111-112)

c) That each of the assumptions of fact relied upon by plaintiffs' witness Caldwell to support his conclusions was not a proper accounting assumption. (Tr. 112)

d) That sound accounting principles, and the provisions of the amended Declaratory Judgment, require the use of actual data, which was available and examined by the witness, for the years in question in computing net royalty profits for calendar years 1971, 1972 and 1973 and that the computations made by plaintiffs' witness Caldwell were improper projections and extrapolations based upon profit margins in other years and grounded upon unrelated and unreliable assumed data. (Tr. 113)

e) That accounting records were available to make actual computations, without projections or extrapolations from prior operations, of profit royalties due in the years in question following meticulously the accounting procedures approved by the Lessor and utilized by the parties prior to 1965. (Tr. 113-114)

f) That the actual amount of net profit royalty due if production were to be limited to actual production at the Sigurd plant during calendar years 1971-73 is $161,597 (R. 369; Def. Ex. C).

g) That the amount of net profit royalty due if all sales in the historic Sigurd market area were to be considered, taking into account the depletion of ore available at Sigurd for the manufacture of all gypsum products involved is $247,157. (R. 364; Def. Ex. C).

h) That accounting exhibits, which were offered but rejected by the Court, showed the proper computation of net profit royalties under the assumptions made in the next preceding two paragraphs. (Tr. 113; Def. Ex. C).

By way of additional facts to support Mr. Oliver's accounting testimony and exhibits, defendant would call as witnesses the quarry superintendent for the Sigurd plant, the plant engineer for the Sigurd plant, the quarry and maintenance superintendent for the competitive and contiguous United States Gypsum Company plant, the production superintendent for Georgia-Pacific Corporation who also served as a United Nations consultant on gypsum reserves, and independent consultant H. J. VanderVeer of H. J. VanderVeer & Associates, Consulting Engineers and Geologists, Salt Lake City, each of whom would testify that as of August 31, 1974, estimated reserves of the kind and quality of rock required to manufacture gypsum products from the leased premises were approximately 58,420 tons, with a stockpile of ore of 21,033 tons, which amounts of ore would be depleted in a few months from the date of trial. (Tr. 107-108)

Mr. Glenn Wilson, Vice-President of Georgia-Pacific Corporation, in charge of all gypsum operations, if permitted to testify, would state. (Tr. 100-106):

a) That contrary to Caldwell's testimony, per unit costs for the manufacture of gypsum wallboard did *not* remain constant from the base years utilized by Cald-

well (1962-64) to the years 1971-73; that per unit costs increased in excess of $3.00 per 1,000 square feet between those periods which, alone, would have resulted in a profit decline of $400,000 per year and a net royalty decline of $28,000 per year; that Federal price controls and freezes were in effect during the calendar years in question and throughout virtually all of the period involved (1971-73), which prevented defendant from following the pricing trends incorrectly assumed by Caldwell;

b) That the base years, 1962-64, utilized by Caldwell to determine "profit margin" were the most profitable years in the entire history of the Sigurd plant and that the years 1965 through 1967, assumed by Caldwell as his production base, were the highest volume of production in the history of the Sigurd plant.

c) That during years 1971-73, defendant's Acme plant did not sell gypsum products in the "historic market area" of the Sigurd plant as defined in the Declaratory Judgment and thus could not have acted to depress the market price of gypsum wallboard, contrary to the assumption of Mr. Caldwell. (Tr. 102-03)

ARGUMENT

POINT I

THE TRIAL COURT ERRED BY RULING AS A MATTER OF LAW THAT THE ONLY PERMISSIBLE ACCOUNTING METHOD TO BE USED IN DETERMINING NET

PROFIT ROYALTIES UNDER THE LEASE WAS THE PROCEDURE UTILIZED IN EXHIBITS 139 THROUGH 143 IN THE PRIOR CASE.

This appeal turns upon whether or not defendant breached the provisions of a Fifty-Year Lease (R. 287) in computing lease royalty payments for calendar years 1971, 1972 and 1973. The Lease itself, together with an amended Declaratory Judgment (R. 411) interpreting certain of its provisions, were before the Court below. However, rather than to afford to the Lease language, and to the language of the amended Declaratory Judgment their plain meaning, the Court below erroneously seized upon language contained in the opinion of this Court entered in the prior litigation between the parties as mandating a sole, perpetual and arbitrary method of computing royalties. This method is contrary to the Lease provisions and to the amended Declaratory Judgment. In this regard, the Court below erroneously ruled, at the close of opening statements at page 34 of the transcript:

> [I]t's my understanding that I should look to the manner of accounting as set forth in those three or four exhibits [Exhibits 139-143] and that's what I'm going to do and so if it is a matter of law, we will decide that right now and it is decided.

In this argument, we shall first discuss and show the clarity and unambiguity of the provisions of the Lease and of the amended Declaratory Judgment. If this Court should find ambiguity in the language of

either the Lease or the amended Declaratory Judgment, we submit that such ambiguity should be resolved by looking to the *admissions* of plaintiffs below; and further that plaintiffs are estopped by their action below from here rejecting the very language which they sponsored. Finally, we will argue that the amendments made to the Declaratory Judgment, on remand, by the Court below are consistent with the prior opinion of this Court.

1. *The Language of the Lease*:

The lease provides in pertinent part (P. Ex. 1-A, p. 7; R. 293):

> The Lessee and Lessor covenant and agree that the net profit, aforesaid, *shall be determined in accordance with sound accounting principles and practices* in the gypsum industry, and lessee, and his assigns, agree that the business operations shall be carried on in a prudent and businesslike manner for all interests concerned. [Emphasis added]

It appears to us that this particular language is free from ambiguity. It follows that the same binds the parties according to the plain meaning of the words which they chose to govern their relationship. This rule is clearly enunciated in *Bryant v. Deseret News Pub. Co.*, 120 Utah 241, 233 P.2d 355, 356 (1951) as follows:

> Plaintiff also invokes the rule of interpretation that doubtful, ambiguous terms in a contract should be interpreted against the party who has chosen the terms. 12 Am. Jur., Sections 250 and 252. We agree that these rules of construction should be considered in determining what is a

> reasonable and fair interpretation of the intention of the parties. However, *if the language is clear and is not susceptible of more than one interpretation, the ordinary plain meaning of the words must be used.* [Emphasis added]

This language also binds the Court for it may not substitute its notions for the bargain negotiated by the parties without running afoul of the constitutional guarantees which are discussed below. We also note, parenthetically, as shown in the appeal to this Court of the prior case, that the "terms" of the agreement here were those enunciated by plaintiffs' attorney Willis W. Ritter who acted as the scrivener and who also acted as a long-time trustee of the plaintiff trust. It follows that any arguable ambiguity in the lease language must be interpreted against the interests of the plaintiffs.

It should be noted that this language was *not* amended by the original Judgment in the prior case, by this Court's decision or by the Order on Remand amending the Judgment. The language *stands.* It binds the Court and the parties.

It follows that the Court below committed grievous error for it refused to receive or consider competent testimony that plaintiffs' accounting *was not* "in accordance with sound accounting principles and practices" for the particular years in question. The Trial Court further erred by *refusing to receive* or consider competent testimony showing that royalties as computed by defendant *were* "in accordance with sound accounting principles and practices."

Hence, the Court below accepted plaintiffs' version of hotly contested facts, wholly refusing to consider defendant's evidence. This action is tantamount to the granting of a Motion for Summary Judgment in the presence of genuine issues of fact. The rule of law here applicable has been restated many times by this Court. Illustrative is this Court's opinion found in *Russell v. Park City Utah Corp.*, 29 Utah 2d 184, 187, 506 P.2d 1274, 1276 (1973):

> The fundamental controlling rule in this case is that summary judgment should be granted only when it clearly appears that there are no issues of material fact in dispute which if resolved in favor of the adverse party would entitle him to prevail. Applying that rule to what we have said herein it is our opinion that there should be a plenary trial and resolution of all of the issues tendered by the parties to this lawsuit. It is remanded for that purpose. Costs to defendant (appellant). [Footnote omitted]

It follows that the Judgment must be reversed.

2. *The Language of the Order Amending the Declaratory Judgment on Remand.*

On remand from this Court, the Court below entered its Order amending the Declaratory Judgment. The pertinent language from that Order reads (R. 415):

> 4. That the Court hereby *declares* that until the Fifty Year Lease between the parties, which is hereby found to be valid, subsisting and binding in accordance with its terms, expires, and *so long*

> *as there is rock of the kind and quality needed on the Leased Premises therein described,* defendant Georgia-Pacific Corporation and/or its subsidiaries and controlled agencies shall (a) if they choose to enter and make sales of gypsum products in the historic Sigurd Plant market area as defined in modified Finding of Fact No. 27 herein, then all such products sold in said area must be manufactured with gypsum ore taken from the Leased Premises; and (b) shall compute and pay to plaintiffs net profit rentals as provided in the Fifty Year Lease *by the method approved by the Lessor and utilized by the parties in the years prior to 1965.* [Emphasis added]

We assert that this language likewise is free from uncertainty or ambiguity and, for the same reasons, binds the parties and the Court. Furthermore, this clear language binds the parties and the Court under the doctrine of res adjudicata. In support of this contention, we quote from *Tiffany Productions, Inc., Limited, et al v. Superior Court in and for Los Angeles County, et al,* 22 P.2d 275, 276 (Cal. App. 1933):

> Somewhat reduced in form, the second question propounded by the petitioner herein in substance is whether the ruling by the court on the first motion to increase the amount of the undertaking was res adjudicata. If it was, of course, it should follow the ordinary rule obtainable with reference to judgments; that is to say, that the court thereafter had no authority by its order either to modify, or to reverse the former order made by it. In other words, if the first order in question ranked as a judgment, the court thereafter was

> unauthorized to disturb it in the manner or by the method adopted by the defendant for that purpose. And although disaffirming any intention to accurately define what is meant by the expression 'res adjudicata,' as a starting point for ensuing observations it may be assumed that included within the boundaries of a complete exposition of the significance which properly may be ascribed to the term is *the general doctrine that in any action or proceeding an issuable fact once legally decided therein is thereafter beyond dispute as between or among the parties either in that or in any other action or proceeding in which the same parties or their respective privies may be litigants.* (Emphasis added)

The language of the amended Judgment (R. 415) specifically imposes the following three constraints:

a) *The accounting procedure must consider all sales by defendant "in the historic Sigurd market area."*

Plaintiffs' evidence, received over objection, admittedly does not consider all of such sales. Instead, plaintiffs' accounting is premised upon *only* the sale of 128,539,000 square feet in each year, relying upon Judge Erickson's original Finding No. 27 which compelled production at that level. One need only to look to the prior opinion of this Court (30 Utah 2d 6; R. 36) to show that this approach is erroneous. In that opinion, plaintiffs' foundational Finding No. 27 (128,539,000 square feet) was *reversed* with instructions to the Trial Court to amend the same on remand. In reversing, Justice Henroid stated: "So being, Finding 27 is held to be not only *irrelevant* to the facts, but *irreverant* to

the leasehold." (30 Utah 2d at 12; R. 39; emphasis added).

But to add insult to injury, the Court below, after having erroneously received this evidence, proceeded erroneously to refuse to consider competent testimony proffered by defendant to account for all "sales of gypsum products in the historic Sigurd market area" during 1971, 1972 and 1973. (Tr. 110)

This requirement that only Sigurd ore be sold in the Sigurd historical marketing area raises a practical problem as shown by defendant's proffer of proof. A substantial portion of the gypsum products sold by defendant in Sigurd's historical marketing area during the years 1971 through 1973 came from Lovell rather than from Sigurd ore. Defendant was not constrained to limit its sales in the Sigurd historical market to products made from Sigurd ore until the entry of the final Amended Judgment in November of 1973, near the close of the accounting period involved. To conform to the objective of the language of paragraph 4 of the Declaratory Judgment, as amended, since it was impossible for defendant to conform to it literally, defendant proposed as one alternative in its offer of proof that plaintiffs be paid a royalty upon all gypsum products sold in the Sigurd historical marketing area *regardless* of the source of the ore from which the products were produced. (Def. Ex. C)

The use of this alternative requires review of ore reserves available at Sigurd. This is true, as noted be-

low, because both the Lease itself and the Declaratory Judgment condition defendant's duty upon availability of rock at Sigurd of the kind and quality needed. Defendant's offer of proof demonstrated that there were not sufficient reserves of "rock of the kind and quality needed" in the Leased Premises to produce at Sigurd all of the gypsum products sold in the Sigurd marketing area during the accounting period under study. Therefore, in defendant's Exhibit C, offered but rejected by the Court below, net profit royalties are limited to those that could have been generated by available ores at Sigurd.

For these reasons, the Trial Court erred both in admitting plaintiffs' evidence, based as it is wholly upon the Finding 27 level of production, and in excluding accounting evidence embracing all sales in the historic Sigurd market area, for which, according to the prior opinion of this Court, defendant must "pay tribute". (30 Utah 2d at 12; R. 39) Accordingly, the Judgment should be reversed for this reason alone.

b) *Defendant's duty to pay net profit royalties is expressly conditioned upon the availability "in the Leased Premises" of "rock of the kind and quality needed."*

As quoted above, plaintiffs ignored this provision of the Declaratory Judgment (R. 415) and objected to evidence offered by defendant to show that there was not sufficient "rock of the kind and quality needed on the Leased Premises" to manufacture all of the gypsum products sold in the "historic Sigurd plant market area"

during years 1971, 1972 and 1973. The Court below erroneously sustained this objection and refused to admit any evidence at all on this subject. This error alone requires reversal.

c) *The "net profit rentals" were required to be computed "by the method approved by the Lessor and utilized by the parties in the years prior to 1965".*

The accounting evidence offered by plaintiffs and received by the Court over defendant's objection, admittedly was not in accordance with this language. This evidence is grounded upon a production level *never* achieved prior to 1965, is not computed from actual available cost and sales records for the years in question as was "utilized by the parties in the years prior to 1965"; instead it relies upon production and sales from plants in Lovell, Wyoming and Acme, Texas that were not even in existence prior to 1965, and is based upon numerous assumptions and extrapolations *never* known to or "utilized by the parties in the years prior to 1965". As we argue in more detail below, the Court erred in even *admitting* the evidence of plaintiffs.

But, a more serious error was the Court's rejection of the testimony of Mr. Fred Oliver, Managing partner of the accounting firm, Haskins & Sells, in Utah:

a) showing the precise nature of the accounting method approved by the Lessor and utilized by the parties in the years prior to 1965;

b) showing that actual records are available for

years 1971, 1972 and 1973 from which the net royalties can be computed in the precise manner "approved by the Lessor and utilized by the parties in the years prior to 1965";

c) showing that plaintiffs' accounting does not follow that required "method";

d) showing the amount of net royalties due utilizing that required "method". (Tr. 108, et seq.)

This proffered evidence was relevant, and indeed required, to make Findings under the concise language of the amended Declaratory Judgment. The Court's error in rejecting this evidence alone requires reversal.

3. *The Admissions of Plaintiffs Below.*

Even assuming arguendo some ambiguity or uncertainty in the language of the Lease or of the amended Declaratory Judgment, the plaintiffs are in no position to avoid or explain away the same and rely on proving their case by reference to the first trial or to this Court's prior opinion. In that connection, the record shows that after the remand by the Supreme Court, plaintiffs initially filed in the Trial Court a "Motion to Modify Findings of Fact and Conclusions of Law and Judgment, pursuant to Opinion and Order of the Supreme Court of the State of Utah". (R. 416) That motion, as here pertinent, erroneously proposed that Finding of Fact No. 27, Conclusion of Law No. 8 and Judgment each be amended to require future computations of net profit

rentals under the Lease as follows: "in the manner exemplified in plaintiffs' Exhibits 139-143, inclusive . . . ." (R. 420) Hence, the principal thrust of plaintiffs' original "Motion to Amend" was to fix perpetually as the *only* proper accounting procedure, that method reflected by Exhibits 139-143 used in the first trial.

Defendant duly filed its Objections to Plaintiffs' Motion to Modify Findings of Fact and Conclusions of Law and Judgment. (R. 422) Defendant pointed out therein that plaintiffs' proposed modifications would be *inconsistent* both with the clear, unambiguous and uncontroverted provisions of the Lease Agreement and with the decision of the majority of the Supreme Court. Defendant specifically moved that the Trial Court delete completely all reference to Exhibits 139 through 143 and add two provisions which defendant contended were necessary to make the proposed modifications of the judgment consistent with the provisions of the Lease itself and the majority opinion of the Supreme Court. Those changes were:

a) Insertion of the following language as a proviso: *"provided that rock of the kind and quality needed can be supplied from the leased premises"*. (Emphasis added) This language was obviously mandatory because of the provisions of the lease and the language of the majority opinion.

b) Adding, in lieu of the language to be deleted relating to prior Exhibits 139-143, a requirement that the 7% net profit royalties be computed in the *"manner*

utilized by the parties in years prior to 1965". (R. 422, et seq.; emphasis added) This change was obviously required to conform with the clear language of the lease and the reversal of Finding No. 27 by this Court and the instructions of this Court on remand.

At the hearing on plaintiffs' Motion to Modify and defendant's objections thereto, plaintiffs *withdrew* their proposed initial modifications and accepted conceptually those of defendant's objections which are stated above. In that connection, plaintiffs consented to, and indeed proposed, the adding of the following proviso: "provided rock of the kind and quality needed can be supplied from the Lessor's mining properties." They also consented to and actually *proposed* at the hearing to amend the Judgment of Judge Erickson on November 14, 1973 the deletion of reference to Exhibits 139-143 and a substitution in lieu thereof of language requiring computation of the 7% net royalty *"by the accounting method approved by the Lessor and utilized by the parties in the years prior to 1965."* (Emphasis added)

In so doing, Dennis McCarthy, Esq., one of counsel for plaintiffs, stated in pertinent part at pages 5, et seq. of the transcript of the November, 1973 hearing:

> Now, your Honor, this [the original Motion to Amend Findings, Conclusions and Judgment] represented my best effort when I wrote this motion, but after I reviewed the objections of the defendant on this Finding 27, they suggested number one of course, we're not entitled to anything as far as Finding 27 is concerned. Then they say even assuming arguendo —

Reading from their objections . . .

— proposed by plaintiff it's appropriate the last two lines thereof must be deleted and the following language substituted in lieu of. "*Method utilized by the parties in the year prior to 1965*" —and that your Honor, of course, eliminates the reference to the particular exhibit which the court based its damage calculations on; and the justifications for using those exhibits of course was that from the records of Georgia-Pacific that were supplied to us, they took the lease over in 1965. From the records they supplied to us it was impossible to make a calculation *so we had to do an extrapolation* as to how he could arrive or as to what method of accounting would be utilized.

What was the method in effect prior to 1965, but rather than argue with the defendant about this particular thing, I have proposed to in substance adopt their suggestion and in a proposed order which I had prepared for the court, *I have made a change* in Finding 27 on the bottom by putting the change in *in accordance with their suggestions, calculated by the accounting method approved by the Lessor and utilized by the parties in the years prior to 1965.*

Now, it may be that the records they have will not allow such a calculation, and if so, I suppose we'll have to go to some sort of an extrapolation exhibit, such as was contained in Exhibits 139 and 143, *but at least I think the principle is correctly recognized by the defendant that what in effect the court gave us by way of declaratory was that the method utilized prior to 1965 was the one that is proper under the lease.*" [Emphasis added]

The complaint fostering the instant appeal was filed on June 7, 1974. In the complaint and at the trial below, plaintiffs renewed their attempt, *abandoned* on the record below, to fix as the *only* proper accounting procedures, that accounting method reflected by Exhibits 139-143 used in the prior trial. The Trial Court's action in the latter trial in adopting plaintiffs' contentions in this regard is contrary to the generally accepted rule of law enunciated as follows in 2 ALR 2d at page 546:

> As a general proposition, a judgment entered by agreement or consent is as conclusive on matters in issue as one rendered after contest and trial, and is binding in a subsequent suit insofar as it has relevancy to the matters in issue which are substantially identical with those adjudicated by the former judgment.

Cases which follow this generally accepted rule are numerous but we have elected to cite only one involving Utah litigants. In *Bergeson v. Life Insurance Corp. of America*, 265 F.2d 227, 235 (10th Cir. 1959), the Tenth Circuit Court of Appeals had this to say:

> Defendant Pugsley asserts the defense of res adjudicata and obtained a summary judgment in his favor. The basis of his defense is a judgment of dismissal entered on stipulation of counsel by a Utah court on March 7, 1957, dismissing an action brought by Pugsley against the company to recover unpaid director's fees. The judgment stated that the action, 'together with any possible counterclaims relating thereto,' was dismissed

with prejudice. . . . The point is of no avail as the state court unquestionably had jurisdiction of the parties and of the subject matter and had power to enter the judgment which it did. *A judgment of dismissal pursuant to a stipulated settlement is ordinarily a judgment on the merits barring another action for the same cause.* No suggestion is made of fraud or collusion. Whatever claim there may be of lack of corporate power in the absence of stockholder action should be addressed to the Utah court. At the most it is a collateral attack on the judgment which may not be made here." [Emphasis added, citations omitted]

Plaintiffs here consented to, indeed affirmatively sponsored, the language of the amended Declaratory Judgment which they now find to be offensive because it would bar their recovery. Nonetheless, they are bound thereby and should not be permitted to prosper by the attempt here to reinstate their previously abandoned concept. To do so would permit them to escape from the judgment to which they consented and would violate the doctrine of estoppel as recognized by this Court. In *Migliacco v. Davis, et al*, 120 Utah 1, 232 P.2d 195 (1951), this Court paid its respect to this doctrine by placing its imprimatur on a rule stated in American Jurisprudence. There the Court stated at page 8 of the Utah Reporter:

"* * * Equitable estoppel or estoppel in pais is the principal by which a party who knows or should know the truth is absolutely precluded, both at law and in equity, from denying or asserting the contrary of, any material fact, which, by

his words or conduct, affirmative or negative, intentionally or through culpable negligence, he has induced another, who was excusably ignorant of the true facts and who had a right to rely upon such words and conduct, to believe and act upon them thereby, as a consequence reasonably to be anticipated, changing his position in such a way that he would suffer injury if such denial or contrary assertion were allowed."

Application of this doctrine to the facts of this case would preclude plaintiffs from now reasserting and the Trial Court from holding that Exhibits 139-143 are the sole permissible method of royalty computation after defendant *relied* upon the *complete abandonment* by plaintiffs of that concept in the Court below. The Judgment should therefore, be reversed.

4. *The Prior Opinion of this Court is Consistent with the Amendments to the Declaratory Judgment on Remand and with the Position of Defendant Asserted Herein.*

The prior opinion of this Court does *not* hold that the sole and perpetual method of computing *future* net lease royalties is that used in preparing Exhibits 139-143 in the prior case. Indeed, the contrary is true. This is so because the *original* Finding No. 27 (admittedly essential to make the royalty computations under the Exhibit 139-143 methodology) was rejected by this Court as being "not only irrelevant to the facts but irreverent to the leasehold". This Court further stated in reversing as to Finding 27 (30 Utah 2d at 12; R. 39):

> Our Conclusion as to Finding 27, therefore, is that it is not supported by the wording of the requirements of the lease or the facts, as to either of its two facets.

This Court, in its opinion, cited and noted with approval, and did not change or modify, the Lease language requiring application of "sound accounting principles" in calculating lease royalties. The opinion commented favorably upon the procedures utilized by the parties prior to 1965, stating (30 Utah 2d at 9; R. 37):

> Thus, for about a quarter century and for about half of the life of the lease, by consent and uncontroverted ratification of four predecessor lessess not objected to by the defendant as to method, the formula determining the 7% net profit rental was recognized by condescension and silence.

It was in keeping with this language that counsel for plaintiffs (1) withdrew their attempt to freeze the Exhibit 139-143 methodology into the Declaratory Judgment, (2) admitted that "what in effect the Court gave us by way of *declaratory* was that the method utilized prior to 1965 was the one that is proper under the lease" (emphasis added), and (3) sponsored the Judgment language adopted by the Court below in its amended Order.

The only explanation that we can find for the action of the Trial Judge in the case from which this appeal is taken is that he confused this Court's *affirmance* of the money judgment with its *reversal* of the prospective *declaratory* judgment which was the sub-

ject of McCarthy's admissions. In this regard, this Court stated (30 Utah 2d at 13; R. 40):

> We conclude that the *money judgment* of the trial court be and it hereby is affirmed, as is the rest thereof, including that portion sustaining the accounting procedure reflected in Exhibits 139-141, but excepting that portion of the 'requirements' portion of the lease discussed hereinabove [viz., original Finding 27 containing the required production level which is necessary in making the Ex. 139-141 computations]. *That part is reversed* with instructions to *modify* the same in consonance with the observations and opinion stated here. [Emphasis added]

In the next paragraph of the opinion, this Court explained why "Finding 27" data, and hence Exhibits 139-143, *could* be relied upon in the case before it as constituting the *sole* foundation for a *money judgment* for years prior to 1971 but could *not stand prospectively* for future years as part of the Declaratory Judgment. The reason stated by this Court was that the record presented a situation where the court found "evidence reasonably showing inaccessibility of records under the discovery process" for the prior period.

Judge Tibbs apparently understood this distinction between the *money* judgment and *declaratory* judgment language in the Opinion of this Court when he entered the amendatory Order on remand, for the Order entered was consistent therewith. (R. 415) However, that difference later escaped him at trial and led him to the error here complained of.

By reason of the foregoing arguments and authorities, it is clear that defendant's proffers of proof at trial were relevant and admissible (1) under the Lease language, (2) under this Court's prior opinion and (3) under the specific language of the amending Order of the Trial Court. It follows that the Trial Court erred and that the Judgment must be reversed.

POINT II

THE TRIAL COURT ERRED BY ADMITTING INCOMPETENT TESTIMONY AND DOCUMENTARY EVIDENCE OVER OBJECTION AS TO PROPER ACCOUNTING PROCEDURES AND COMPUTATIONS OF ROYALTY PAYMENTS CLAIMED TO BE DUE UNDER THE LEASE.

The Trial Court erroneously received in evidence Exhibits 139A through 148A, together with the supporting testimony of Mr. Caldwell, over objections of defendant that the same were not supported by proper foundation. (Tr. 45-49). The Trial Judge accepted plaintiff's fallacious argument that since the exhibits were identical to those received in evidence in the former case, they were admissible in the latter. We submit that it is not that simple and that this evidence was not admissible here in the absence of a necessary foundational finding which the Court below could not make (1) because of Mr. Caldwell's admissions on cross ex-

amination[5] and (2) because the Court rejected all evidence offered by defendant relating to the lack of foundation of Mr. Caldwell's evidence.

In the prior case, Judge Erickson found on the basis of evidence before him that plaintiffs had sustained their burden of proof to establish *liability* for years 1965-70 in that defendant had "departed from accounting procedures applied" by the parties prior to 1965 and had not "carried on its business operations under the Lease in a prudent and businesslike manner for all interests concerned" during those years.

He then turned to the question of damages and considered Exhibits 139-143 *only* because he found from the evidence before him for those years that defendant had not "maintained its books and records" in a manner "which will permit a proper accounting of the net profit lease rentals due plaintiffs under the Lease". In affirming the use of that evidence in computing the money judgment, this Court likewise relied upon the foundational findings of the Court below showing "inaccessibility of records" for those years. Such foundational findings are *not* supportable on this record. Mr. Caldwell testified that the records of defendant were maintained in the same manner during 1971-73 as was the case in 1965-70. However, defendant offered to prove through its expert witness Fred Oliver, who had

[5] The specific disclosures drawn from Mr. Caldwell upon cross examination illuminating the lack of foundation in his evidence (Plaintiffs' **only** evidence), as well as the specific evidence offered by defendant independently establishing the lack of foundation in Mr. Caldwell's testimony have been cited earlier and are set forth in the Appendix attached hereto.

personally examined defendant's books and records covering years 1971-73, that every necessary record was available to compute net profit royalties in accordance with sound accounting principles and by the methods approved by the Lessor and utilized by the parties in the years prior to 1965. (Tr. 111-112) His testimony, together with that of Glenn Wilson, if received, would have demonstrated the absolute falsity of each of the numerous factual assumptions made by plaintiffs' single witness.

In addition, to the extent the "Caldwell evidence" is sought to be relied upon to establish liability in this case, plaintiffs will run afoul of Rule of Evidence No. 19, adopted by this Court effective July 1, 1971. That rule provides that a witness must either have "personal knowledge" or "experience, training or education" relating to "relevant or material matter". Mr. Caldwell conceded that he had neither personal knowledge nor did he have experience, training or education concerning numerous of the matters involved. In the absence of such expertise, he admitted that he relied wholly upon assumptions or inferences of fact. Some of his specific admissions in this connection have been referred to earlier and are set forth in the Appendix attached hereto. This brings into play the doctrine enunciated in *Jangula v. U.S. Rubber Co.*, 147 Mont. 98, 410 P.2d 462, 467 (1966) in which the Montana Supreme Court stated as follows in holding erroneous the admission of expert medical testimony not supported by actual evidence of facts which were assumed:

> The rules relating to testimony of an expert witness have been set forth in Irion v. Hyde, 110 Mont. 570, 105 P.2d 666. The expert must first testify to the facts *within his own knowledge or based upon his observation* upon which his opinion is based. He must have the training and experience to draw a correct inference from facts outside of the range of the ordinary human experience. The judgment of an expert will not support the verdict *when opposed by undisputed facts and the dictates of common sense.* Where, as here, the conclusions of experts are based upon facts which do not exist, *or are the result of an inference*, admission over objection is erroneous. [Emphasis added]

Here the so-called "evidence" is based upon a series of pyramided inferences concerning which Caldwell had neither knowledge nor experience. That alone would require rejection of the evidence under the *Jangula* doctrine and under the requirements of this Court's Rule of Evidence No. 19. However, the record now before us contains a much more compelling case for exclusion; this for the reason that through proffers of proof with respect to each and every "inference or assumption" relied upon by Caldwell, persons with actual knowledge of those facts were prepared to testify that the inferences and assumptions were false as a matter of fact. (See the attached Appendix) Since the Court below refused to consider these facts, the "summary judgment" rules, discussed above, are here controlling. For the purposes of this appeal, the proffered testimony must be assumed to be true. Hence, the "undisputed facts", for purposes of this appeal, show that the con-

clusions and opinions of Mr. Caldwell are based upon "facts" which "do not exist". It follows that the "evidence" sponsored by plaintiffs and received by the Court below is wholly without any foundation whatsoever.

In short, on this record, one is left *only* with the unfounded Caldwell testimony to establish the necessary foundational finding of "inaccessibility" of accounting records. That testimony was duly controverted by the defendant's offer of proof. In view of the genuine issues of fact thus resulting, the foundational finding cannot be made and this "evidence", bottomed as it is upon assumptions of fact admittedly beyond Caldwell's knowledge and beyond the field of his expertise, cannot stand. It follows that the Judgment should be reversed.

POINT III

THE TRIAL COURT ERRED IN ENTERING FINDINGS OF FACT DETERMINING SOUND ACCOUNTING PROCEDURES AND ACCOUNTING METHODS USED BY THE PARTIES PRIOR TO 1965 IN THE ABSENCE OF EVIDENCE AND CONTRARY TO ADMISSIBLE EVIDENCE ON THAT SUBJECT OFFERED BY DEFENDANT.

The Trial Court made a specific finding (Findings of Fact, Para. 4; R. 103) that the plaintiffs' accounting testimony and exhibits received in evidence were in conformance with the "best and proper accounting procedure[s]" for determining the royalties owing plain-

tiffs and were "in accordance with the accounting methods employed by the parties prior to 1965". (R. 103) We concede that this would be a necessary finding to support a judgment for plaintiffs. However, it may not stand on this record.

At trial, counsel for plaintiffs posed a question to Mr. Caldwell to elicit testimony that would support this finding. However, the question was withdrawn and *not* answered by the witness. (Tr. 73-74)

Hence, there is no evidence of record whatever to support this finding. On the contrary, defendant offered to call Mr. Fred Oliver to testify that plaintiffs' accounting was not in conformance with either sound accounting principles or with the accounting methods used by the parties prior to 1965. (Tr. 116) The Court erroneously rejected this testimony upon the ground that it is irrelevant.

In summary, the only evidence offered below demonstrates that the finding is erroneous. It should be set aside and the Judgment should be reversed.

POINT IV

EACH OF THE FINDINGS OF FACT AND CONCLUSIONS OF LAW ENTERED BY THE COURT BELOW IS ERRONEOUS AS A MATTER OF LAW AND MUST BE SET ASIDE.

We will not duplicate under this heading our vari-

ous arguments above. However, we submit that each of the Findings of Fact of the Court below is unsupported by any competent evidence and is contrary to evidence properly proffered by defendant and erroneously rejected by the trial Judge. We further submit that each of the Conclusions of Law is erroneous as a matter of law and that the Judgment entered thereon must be reversed.

POINT V

THE JUDGMENT WHICH IS THE SUBJECT OF THIS APPEAL, IF SUSTAINED BY THIS COURT, WOULD RESULT IN VIOLATION OF DEFENDANT'S RIGHTS TO DUE PROCESS AS PROTECTED BY BOTH STATE AND FEDERAL CONSTITUTIONS.

For the numerous reasons stated above, this Court should never reach this argument. However, we invite the attention of this Court to the fact that the Judgment below, if affirmed, would violate both procedural and substantive due process as protected by both State and Federal Constitutions.

First, the Court below arbitrarily rejected *all* of the evidence proffered by defendant, all of which was relevant and admissible. This was an effective denial to be heard and to present evidence, each of which was violative of procedural due process. In *Republic National Bank of Dallas v. Crippen*, 224 F.2d 565 (5th Cir. 1955), the court held that the trial court's refusal

to allow appellants to introduce any evidence in support of their claims denied them a right to a hearing, which was a denial of due process. The court stated in this connection at page 566:

> The right to be heard on their claims was a constitutional right and the denial of that right to them was a denial of due process which is never harmless error. [Citations omitted]

In *Jenkins v. McKeithen*, 395 U.S. 411, 23 L.Ed. 2d 404, 89 S.Ct. 1843 (1969), Mr. Justice Marshall, speaking for the United States Supreme Court, stated the applicable rule where a party is deprived of his right to present evidence as follows (23 L.Ed. 2d at 421):

> The right to present evidence is, of course, essential to the fair hearing required by the due process clause. See e.g., Morgan v. United States, supra, at 18, 82 L.Ed. at 1132; Baltimore & Ohio Railroad Co. v. United States, 298 U.S. 349, 368-69, 80 L.Ed. 1209, 1223, 1224, 56 S.Ct. 797 (1936).

Second, affirmance of the Judgment below would also result in the taking of valuable property interests of defendant without due process of law. It is clear, as stated in *Forde L. Johnson Oil Co. v. H. F. Johnson Oil Co.*, 372 P.2d 135, 137 (Ida. 1962) by the Idaho Supreme Court, that

> The right to make contracts is both a liberty and a right, and is within the protection of the guarantee against the taking of liberty or property without due process . . .

Defendant here has possessed a valuable contract right in the form of the Fifty-Year Lease Agreement for nearly thirty years. As noted by Judge Henroid in the prior opinion of this Court, a "formula" had been followed by the parties in interpreting the provisions of that lease for "about a quarter century." The Judgment appealed from makes a radical and arbitrary departure from that "formula." The result robs defendant of its bargain, and takes and confiscates its property, all without due process.

In the landmark case of *Chicago, Burlington & Quincy Railroad Co. v. City of Chicago*, 166 U.S. 226, 41 L.Ed. 979, 985 (1897), Mr. Justice Harlan noted that rights secured by the 14th Amendment are protected against acts of "all instrumentalities of the state," including its "judicial authorities." He then stated:

> The mere form of the proceeding instituted against the owner even if he be admitted to defend cannot convert the process used into due process of law, if the necessary result would be to deprive him of his property without just compensation.

We submit that the necessary result of affirming the Judgment below with its wholly arbitrary and critical impact upon defendant would be to deprive it of its clear and long standing contract rights without due process.

It follows that the Judgment must be reversed.

CONCLUSION

For each of the numerous reasons stated above, it is clear that the Findings of Fact, Conclusions of Law and Judgment entered by the Court below are erroneous as a matter of fact and as a matter of law and cannot stand. We urge this Court to reverse the same.

Respectfully submitted,

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APPENDIX

Defendant sets forth below some of the specific admissions of Mr. Grant Caldwell, plaintiffs' accounting and only witness, disclosing the lack of foundation in his testimony. Also, some of the specific offers of evidence made by defendant are enumerated, independently showing that Mr. Caldwell's testimony is lacking in foundation.

1. Mr. Caldwell incorrectly assumed that the profit margins of the Sigurd plant for the years 1962-63 would have remained the same for the years 1971-73, taking into account inconsequential adjustments. (Tr. 77). In contravention of this assumption, defendant offered evidence that profit margins would be different because (a) the cost of production had increased (Tr. 103-104) and (b) the marketing price of gypsum board had not risen commensurately due in part to the rules and regulations of the Federal Government imposing the price freeze of 1971-73. (Tr. 100-101). Specifically, defendant offered proof that profit margins did *not* remain constant over the years but in fact that the profit margins narrowed subsequent to 1962-64. (Tr. 104).

2. Mr. Caldwell's assumptions did not take into consideration the actual cost increase per unit of gypsum wallboard between the years 1963 through 1964, on the one hand, and the years 1971 through 1973, on the other; in fact, he assumed that per unit costs re-

mained the same. (Tr. 89-90) However, defendant made an offer of proof that the cost of production at the sigurd plant *increased* by $3.00 per 1,000 square feet between the period 1962-64 and 1971-73. This increase would have resulted in a profit decline of $400,000 per year and a decline of over $28,000 per year royalties owing plaintiffs. (Tr. 103-104)

3. Mr. Caldwell's assumptions did not take into consideration the Federally imposed rules and regulations limiting the price at which gypsum wallboard could be sold between the years 1971 and 1973. Mr. Caldwell stated he failed to do so because he did not believe that the price freeze had any substantial effect upon the price at which wallboard produced at the Sigurd plant could be sold between the years 1971 to 1973. (Tr. 90). In direct contravention of this testimony, defendant offered proof that the price freeze did in fact affect and limit the price at which gypsum wallboard could be sold by the defendant. (Tr. 100-102)

4. Mr. Caldwell chose as his base period, 1962 through 1964, the years of the highest profit margins on the sale of gypsum products he could find from the defendant's records he examined. (Tr. 78). Moreover, defendant proffered evidence that Mr. Caldwell's base period was the *most profitable period* in the entire history of the Sigurd plant. (Tr. 105)

5. Mr. Caldwell erroneously assumed that the Sigurd plant operated at a level of production for the years

1971 through 1973 the same as that for the years 1965 through 1967. (Tr. 80). The truth is, and defendant offered evidence of the same at page 105 of the transcript, that the years 1965-1967 were the years of highest production in the history of the Sigurd plant.

6. Mr. Caldwell used as his base the marketing area in the Eastern United States, as opposed to that in the Western States where the Sigurd products are actually marketed, because he erroneously assumed that the Lovell and Acme plants of Georgia-Pacific had artificially reduced the market price in the West. (Tr. 83-85, 88) In direct contravention, defendant proffered evidence that the Acme plant *did not* ship any gypsum products into the Sigurd marketing area during the years 1971-73. (Tr. 102-103) Moreover, Mr. Caldwell made his assumptions even though he performed *no* marketing or economic studies to determine the actual cause for the price decline in the Sigurd market for the years 1971 through 1973. (Tr. 85-86). In further contravention of Mr. Caldwell's testimony, defendant proffered testimony of Mr. Glenn E. Wilson, Vice-President of Georgia-Pacific Corporation in charge of gypsum operations, that Mr. Caldwell's assumption was false, and that in fact defendant's market share in the West in the years 1971 to 1973 was much less than the market share in the United States generally and in the Eastern markets in particular. (Tr. 103). Additionally, defendant offered proof that Mr. Caldwell's assumption, that the Sigurd plant's market area, the Western United States,

behaved the same as the market area in the rest of the United States, is incorrect. Mr. Wilson would have testified that this is not true, and that in fact the two markets have behaved quite differently. (Tr. 104).

7. Significantly, Mr. Caldwell made his assumptions though he is not an expert in marketing gypsum products and though he is not an expert in the economics of the gypsum industry as applied to the Sigurd plant. Mr. Caldwell acknowledged that his expertise was limited to accounting. (Tr. 77) Defendant, on the other hand, was prepared to introduce the testimony of individuals having expertise in the economics and marketing of gypsum products. (Tr. 107-108).